SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

October Term, 1967

No. 765

RUSSEL MILTON WILLS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR REHEARING

KENNETH A. MACDONALD
DAVID R. HOOD
Attorneys for Petitioner

15th Floor, Hoge Building
Seattle, Washington 98104

METROPOLITAN PRESS SEATTLE, WASH.

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PETITION FOR REHEARING

The petitioner prays for a rehearing of the order of the court entered on June 10, 1968, denying his petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

This petition is based upon intervening circumstances of substantial effect, in particular the decison of the court in *United States v. O'Brien,* 36 U.S.L.W. 4469 (1968), and the decision of the court to grant certiorari in *Oestereich v. Selective Service Local Board No.* 11, No. 1246, October Term, 1967. Both of these decisions substantially alter the grounds upon which a petition for writ of certiorari in *Wills v. United States,* No. 765, October Term, 1967, should be based. This petition is also based upon other substantial

questions of federal law, which were not raised in the petition for certiorari but are available to petitioner, and which are pertinent to the present operation of the Selective Service System and affect thousands of Selective Service registrants.

SUMMARY

Petitioner was indicted and convicted under Title 50 U.S.C. App. §462(a) for refusing induction into the Armed Forces of the United States. It is not disputed that petitioner did so refuse induction, and if Local Board No. 47's induction order was valid, petitioner's conviction must stand. However, if that order was invalid, either because the Board under the circumstances lacked the power to issue it or because the exercise of its power deprived petitioner of constitutional rights, then petitioner cannot be punished for refusing to heed it. *Thornhill v. Alabama,* 310 U.S. 88 (1940); *Thomas v. Collins,* 323 U.S. 516 (1945).

Local Board No. 47 issued the induction order because petitioner's classification was "I-A delinquent," which put him that the top of the order of call. 32 C.F.R. §1642.12. The Local Board had reclassified petitioner from II-S to I-A under the regulation permitting reclassification of a delinquent registrant. 32 C.F.R. §1642.12. As no other change of circumstances appears in the record, petitioner's reclassification was based solely upon his delinquent status. Assuming that this reclassification from II-S to I-A was within the Board's discretion, the validity of petitioner's induction order is directly dependent upon the validity of the Local Board's act in declaring petitioner delinquent.

Selective Service regulations permit a Local Board to declare a registrant delinquent only when the registrant "has failed to perform any duty . . . required of him under the Selective Service law . . . ." 32 C.F.R. §1642.4 (a). And such duty must be an affirmative one created by a specific administrative regulation. See *Wolff v. Selective Service Local Board No. 16,* 372 F.2d 817 (C.A.2d Cir. 1967). Two questions are therefore raised with respect to the Local Board's act in declaring petitioner delinquent. Did petitioner breach an affirmative Selective Service duty such that the Local Board, acting pursuant to 32 C.F.R. §1642.4(a), could declare him delinquent? If so, is the delinquency regulation so vague and overbroad as to impinge upon petitioner's constitutional rights?

Regulation 1617.1 creates an affirmative duty of a registrant "to have in his personal possession at all times his Registration Certificate . . . ." 32 C.F.R. §1617.1. The Court of Appeals found that the Board declared petitioner a delinquent for breach of this duty: ". . . his form of protest constituted an act of willful disobedience of the board's requirement that at all times he retain his draft card in his possession." *Wills v. United States,* 384 F.2d 943, 946 (C.A. 9th Cir. 1967). The Government contends that "(t)he authority to declare petitioner a delinquent . . . *could* properly rest on petitioner's violation of . . . 32 C.F.R. §1617.1." Memorandum for the United States in Opposition to the Petition for a Writ of Certiorari, p. 3 (emphasis added). But we urge that the Board acted upon petitioner's words of protest against the Vietnam war and the draft, not upon conduct, and that the Board's action therefore violated

his constitutional rights to free speech (POINT I) and to petition the Government for a redress of grievances (POINT II).

Even if the Board could act on the basis of the statements in petitioner's letter than he was in violation of the possession regulation, and in fact acted solely on the basis of those statements, and not upon petitioner's expression of unpopular and dissident views, a question arises as to whether the possession requirement, 32 C.F.R. §1617.1, is the kind of "duty" which, if not performed, can be the basis for punitive use of the delinquency procedures (POINT III).

If the writing of a letter to a Local Board protesting the Vietnam war and the draft, and stating that the registrant cannot conscientiously continue to cooperate with the possession regulation, can be the basis for punitive use of the delinquency regulation, then that regulation is unconstitutionally vague and overbroad (POINT IV).

REASONS FOR GRANTING THE PETITION

I

A question is presented as to whether the action of Local Board No. 47 in declaring petitioner a delinquent, classifying him I-A, and ordering him to report for induction, after the Board received a letter of protest from him, violated his federal constitutional right to free speech. This is a question which was not raised in the petition for certiorari, and is of a substantial nature.

Local Board No. 47 can act only under authority from Congress. The power of Congress to limit speech is strictly constrained by the First Amendment. While the right to free speech is not absolute, *Chaplinsky v. New Hamp-*

shire, 315 U.S. 568 (1942), Congress may limit speech by legislation only (1) where "words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils Congress has a right to prevent," *Schenck v. United States,* 249 U.S. 47 (1919), or (2) where the governmental interest in regulating speech is compelling and paramount in relation to the individual's interest in expression. *Communist Party v. Subversive Activities Control Board,* 351 U.S. 115 (1956); *N.A.A.C.P. v. Button,* 371 U.S. 415 (1963).

A. Petitioner's Expression Cannot Be Limited Under the Clear and Present Danger Test:

Petitioner's letter to his Local Board created no "clear and present danger" of any "substantive evil" such that Congress could empower the Board to punish that expression. "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." *Bridges v. California,* 314 U.S. 252, 263 (1941). Petitioner chose an entirely peaceful method of expressing his views, a method which neither incited lawlessness on the part of others nor obstructed the operation of the Selective Service System, and the clear and present danger test does not apply. Even the public burning of a draft card does not meet the clear and present danger test. *United States v. O'Brien,* 36 U.S.L.W. 4469 (1968).

B. Petitioner's Expression Cannot Be Limited Under the Balancing Test:

The balancing test as applied to the instant case compels the conclusion that our society loses more in free

speech than it gains in Selective Service administration by permitting Local Board No. 47 to punish petitioner for writing his protest letter. Petitioner's interest in expressing his protest was strong. He had deep and sincere reasons for opposing the Vietnam war and the peacetime draft, both subjects of great national importance and concern. Petitioner was limited in the means by which he could register a satisfying and effective protest against the war and the draft: he controlled no news media and lacked the resources to advertise or circulate pamphlets. We urge that the countervailing governmental interest in prohibiting the writing of such letters as the Board received from petitioner is not sufficiently compelling to override petitioner's vital interest in freedom of expression.

The court recently held that "Congress has a legitimate and substantial interest in preventing [the] wanton and unrestrained destruction [of Selective Service certificates] and assuring their continuing availability by punishing people who knowingly and wilfully destroy or mutilate them." *United States v. O'Brien*, 36 U.S.L.W. 4469, 4473 (1968). But the court was careful to narrowly limit the scope of that governmental interest: "The 1965 Amendment [to Title 50 U.S.C. App. §462(b)(3)] prohibits such conduct [i.e. knowing and wilful destruction of Selective Service certificates] and does nothing more. In other words, both the governmental interest and the operation of the 1965 Amendment are *limited to the noncommunicative aspect* of O'Brien's conduct." *United States v. O'Brien, supra*, at p. 4473 (emphasis added). There was no "noncommunicative aspect" to petitioner's conduct, since that conduct was restricted to writing a

letter to his Local Board. Petitioner's conduct was a communicative exercise of pure free speech which cannot be suppressed, under the *O'Brien* rule, by a governmental interest in prohibiting the writing of protest letters to a Local Board.

"The state may defend its existence and its functions, not against words or argument or criticism, however vigorous or ill-advised, but against *action*. . . ." Justice Fortas, *Concerning Dissent and Civil Disobedience*, Signet Books (1968), p. 23. The fact that petitioner's letter contained intemperate and perhaps ill-advised statements regarding alleged conduct should not remove the protections of the First Amendment from what was the expression of political protest. The Government, in its brief before the Court of Appeals, too quickly makes the jump from words to actions and argues that the Local Board acted on the basis of petitioner's actions, not on his written protest. Government Brief, at p. 9. We disagree. The Local Board acted on the basis of petitioner's words stated in the course of political protest, not upon conduct. When one is intimately concerned about and personally involved in a controversial and vital national issue, it is too much to require that the expression of one's views avoid intemperate or ill-advised statements. *Cf. Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J., dissenting).

In *Bond v. Floyd*, 385 U.S. 116 (1966), the court held that a State legislature could not constitutionally exclude a duly elected representative because of his statements criticizing Government policy in Vietnam and the operation of the Selective Service System. Bond had stated that he supported those who resisted the draft and that

he admired those who burned their draft cards. But he had not incited others to violate Selective Service laws. In the instant case petitioner expressed opposition to the war and the draft, giving the reasons for his opposition, but he also did not incite other to violate Selective Service laws, as does one who publicly burns his draft card.

The danger in permitting a Local Board to punish a Selective Service registrant for statements he makes in a protest letter to his Board is evident from the record. Petitioner *said* he had destroyed his "draft card," yet the Local Board noted in its records that petitioner had destroyed his "Registration Certificate."[1] How did the Board know he had not destroyed his Notice of Classification, if in fact he had destroyed any card at all? Further, on February 23, 1966, Major Henry Carlson of petitioner's Local Board sent a message by phone to Local Board No. 13 in Seattle, Washington, that "delinquent registrant has been the sort who tore up his draft card and has been causing trouble. . . ."[2] Solely from the *statements* in petitioner's protest letter, the Board concluded that Wills had destroyed his Registration Certificate and that he was a troublemaker, and thereupon acted to punish him.

We submit that the Board's action in punishing petitioner for pure speech unconstitutionally infringed his First Amendment rights, and that the delinquency declaration and subsequent induction order were therefore invalid. The court has granted certiorari in *Oestereich v. Local Board No.* 11, 36 U.S.L.W. 3437 (1968), to con-

1. Selective Service System File, Russel Milton Wills, p. 29.

2. Selective Service System File, Russel Milton Wills, p. 53.

sider whether the act of turning one's draft card into his Local Board is a constitutionally protected act of symbolic speech. Clearly, if the court holds that it is, then the action of Local Board No. 47 in the instant case would be *a fortiori* violative of petitioner's First Amendment rights, since petitioner did not go so far as to turn in his card but merely *said* in a protest letter to the Board that he was no longer in possession of his draft card. But regardless of the disposition in *Oestereich*, we urge the court to grant certiorari in the instant case to consider the further question of the limitation that can constitutionally be placed on the expression of views in a letter from a Selective Service registrant to his Local Board.

II

A question is presented as to whether the action of Local Board No. 47 in declaring petitioner a delinquent, classifying him I-A, and ordering him to report for induction, immediately after the Board had received a letter of protest from petitioner, violated petitioner's First Amendment right to petition the Government for a redress of grievances. This is a question which was not raised in the petition for certiorari, and is of a substantial nature.

Local Board No. 47 is a duly accredited agency of the United States Government which, although not empowered to redress petitioner's grievances, is entitled to all available information, particularly that which might affect petitioner's classification. In his October 19 letter to the Local Board, petitioner stated his opposition to the Vietnam war, informed the Board that he could no longer conscientiously cooperate with the Selective Service Sys-

tem, and gave his reasons therefor. The response of the Local Board in declaring petitioner delinquent, reclassifying him I-A and ordering him to report for induction violated petitioner's First Amendment right to petition a duly accredited representative of the United States Government for redress of grievances. See *Bridges v. California*, 314 U.S. 252 (1941).

In *Adderley v. Florida*, 385 U.S. 39 (1966), a strong dissent by four Justices viewed a civil rights protest at a county jail as within the right to petition the Government for a redress of grievances, and therefore not punishable under a state trespass statute. They found the county jail to be "an obvious center for protest" when it housed prisoners who many thought were unjustly held. The dissenters stated that:

> The right to petition for the redress of grievances . . . is not confined to appearing before the local city council, or writing letters to the President or Governor or Mayor. See *N.A.A.C.P. v. Button* [citation omitted]. Conventional methods of petitioning may be, and often have been, shut off to large groups of our citizens. Legislators may turn deaf ears; formal complaints may be routed endlessly through a bureaucratic maze; courts may let the wheels of justice grind very slowly. Those who do not control television and radio, those who cannot afford to advertise in newspapers or circulate elaborate pamphlets may have only a more limited type of access to public officials. Their methods should not be condemned as tactics of obstruction and harassment as long as the assembly and petition are peaceable. . . . *Adderley v. Florida, supra*, 385 U.S. at 49-51.

The majority narrowly distinguished the case from *Edwards v. South Carolina*, 372 U.S. 229 (1963), on the ground that a jail is a government building to which

the public is denied access, whereas the State Capitol is a government building open to the public.

The entire *Adderley* court, therefore, impliedly held that a peaceful demonstration at a government building to which the public is normally granted access is within the right of the people to petition their Government for redress of grievances.

A Selective Service Local Board is a government facility to which the public has access. All males are required to appear personally at their Local Boards to register. 32 C.F.R. §1611.1. Registrants may go to a Local Board at any time to confer with Selective Service officials. See 32 C.F.R. §1604.41. The Local Board, as the agency of the Government which makes the decisions affecting registrants and with which registrants must deal, is an "obvious center for protest" against the peacetime draft and the Vietnam war. The Court of Appeals for the Second Circuit recently held that a peaceful demonstration against the Vietnam war conducted outside a Local Board office, and thus not significantly obstructing its operation, was lawful and within First Amendment protection. *Wolff v. Selective Service Local Board No. 16*, 372 F.2d 817 (C.A.2d Cir. 1967). If petitioner could have petitioned by demonstration at his Local Board, then he can petition that Board by letter.

Petitioner is a married full-time graduate student in Philosophy who controls no news media, and who lacks the assets to "advertise in newspapers or circulate elaborate pamphlets." Conventional methods of petitioning have proven unrewarding to students such as petitioner. Letters to Congress and the White House have not produced redress. Indeed, Congress has not only turned deaf

ears to the petitions of war dissenters; it has passed laws to the contrary.[3] In view of the October 26, 1967, letter[4] from the Selective Service Director, it is unrealistic to assume that petitions to the Director would have produced the redress sought by petitioner and the thousands of students like him. The plain fact is that "the overwhelming preponderance of those who object to the war are people who have no method of propagating their views on a widespread basis." Velvel, *Freedom of Speech and the Draft Card Burning Cases,* 16 Kansas L. Rev. 149, 152 (1968).

Petitioner has chosen an entirely peaceful method of petitioning the Government, a method which neither incites lawlessness on the part of others nor obstructs the operation of the Selective Service System. In a line of cases, this court broadened the constitutional right of Negroes to petition the Government for redress of their grievances at a time of frustration and disillusionment in the civil rights movement. *N.A.A.C.P. v. Button,* 371 U.S. 415 (1963); *Edwards v. South Carolina,* 372 U.S. 229 (1963); *Adderley v. Florida,* 385 U.S. 39 (1966). We urge that logic and justice compel a similar extension of that right for draft-eligible dissenters in the antiwar movement, and that this is an emminently appropriate case for the court to make that extension. Punishment of orderly and civilized protests, such as a written petition to a Local Board, increases the forces of frustration and disruption which the peacetime draft and the Vietnam war generate in young men in the United States.

3. e.g., the Gulf of Tonkin Resolution, 78 Stat. 384 (1964), and the 1965 Amendment to the Universal Military Training and Service Act, 79 Stat. 586. (1965).

4. New York *Times,* November 8, 1967, p. 1, col. 1.

III

A question is presented as to whether Local Board No. 47's punitive use of the delinquency and reclassification procedures, following receipt of petitioner's protest letter, is authorized by statute or regulation. This is a question which was not raised in the petition for certiorari, and is a substantial nature.

Local Board No. 47 was empowered to declare petitioner delinquent only upon finding that he had "failed to perform any duty . . . required of him under the Selective Service law . ... ." 32 C.F.R. §1617.1. The unperformed duty must be an affirmative duty created by a specific administrative regulation. See *Wolff v. Selective Service Local Board No. 16*, 372 F.2d 817 (C.A. 2d Cir. 1967). Selective Service Regulation 1617.1 requires that a registrant retain his Registration Certificate in his possession at all times. 32 C.F.R. §1617.1.

The question here is whether the possession regulation requires the kind of "duty" which, if not performed, can be the basis for delinquency and reclassification.

Delinquency is analogous to civil contempt: it is designed to coerce compliance with procedures related to classification, not to punish past acts. The significance of delinquency status to the registrant is not that he is being punished for something he has done, but that unless he complies with the rules designed to enable the Local Board to ensure proper classification, he will become available for immediate induction. Indeed, the delinquency regulations provide that last minute compliance will expunge delinquency and stave off imminent induction. 32 C.F.R. §1642.14 (b). The "Delinquency Notice" itself

requests the registrant to contact his Local Board immediately—for the purpose of curing his alleged default. The delinquency procedure, therefore, is the device by which the Local Board can secure from uninformative registrants information that is relevant to classification, not a device by which the Board can *punish* registrants.

Possession by a registrant of his registration certificate is in no way related to the ability of a Local Board to perform its classification responsibilities. A number of regulations empower a Local Board to secure the information it requires for classification purposes. See, for example, Regulations 1641.7(a) (requiring every registrant to keep his Local Board currently informed); 1641.7(b) (requiring a registrant to notify his Board within 10 days of any change in circumstances); 1622.1(c) (providing for the sending of a Classification Questionnaire to any registrant); and 1625.1(c) (permitting Local Boards to obtain information concerning registrant from employers, police and other sources). The court has recently noted that possession of Selective Service certificates aids communication between registrants and Local Boards. *United States v. O'Brien*, 36 U.S.L.W. 4469 (1968). But the duty of the registrant is to keep his Local Board informed of all circumstances affecting his classification, and this duty must be performed whether or not the registrant carries his card. It is this duty that is integral to the relationship between the registrant and the Local Board, not the possession requirement.

It follows that to use reclassification and delinquency procedures as a sanction to enforce the possession requirement is to use these procedures as punishment, not to coerce compliance. The responsibility of Local Boards

is to classify young men and to order their induction on the basis of the classifications, not to punish registrants 32 C.F.R. § 1622.1(b). Acts not integral to the classification process, including willful non-possession of Selective Service certificates, may be crimes under the Act. 50 U.S.C. App. §462(b)(6). As such, they should be punished by prosecution in a criminal trial with proper procedural safeguards, not summarily by a Local Board acting pursuant to delinquency procedures.

The important questions of the nature and validity of the possession requirement have not yet been decided. In *United States v. Kime*, 188 F.2d 677 (C.A. 7th Cir. 1951), the constitutionality of the possession regulation was affirmed, but only as part of a holding that the entire conscription statute was constitutional. In *United States v. O'Brien*, 36 U.S.L.W. 4469 (1968), the majority of the court noted that "we are not concerned here with the nonpossession regulations . . . ." 36 U.S.L.W. at page 4473. The issue is raised in *Oestereich v. Selective Service Local Board No. 11*, No. 1246, October Term, 1967, for which certiorari has been granted. 36 U.S.L.W. 3437 (1968). But in *Oestereich*, the registrant actually returned his draft card to his Local Board. In the instant case, petitioner merely stated in a protest letter to his Local Board that he was not in possession of his draft card and would refuse to possess such a card in the future.

IV

A question is presented as to whether the delinquency regulations, if they can be used to punish a registrant who writes a letter to his Local Board protesting the Vietnam war and the peacetime draft, are unconstitutionally vague and overbroad. This is a question which was not

raised in the petition for certiorari, and is of a substantial nature.

Regulation 1642.4(a) authorizes a declaration of delinquency (and consequent I-A classification and priority induction. 32 C.F.R. §§1642.12, 1642.13) of a registrant who "has failed to perform any duty or duties required of him under the Selective Service law. . . ." 32 C.F.R. §1642.4(a). As construed in this case by Local Board No. 47, the regulation can be applied to punish a registrant for writing a protest letter. Such a construction of the regulation is productive of great uncertainty, since registrants will not know, in communications with their Local Boards, what expression is permitted and what will result in a delinquency classification. The uncertainty regarding use of the delinquency procedures has been further compounded by the October 26, 1967, letter from the Director of the Selective Service, in which General Hershey construes "duty" to include the duty not to violate the Selective Service Act in its entirety, as well as its "related processes," or to perform acts "under unfortunate influences of misdirected emotions. . . ."[5]

A regulation which can be construed so broadly con-

5. New York *Times*, November 8, 1967, p. 1, col. 1, which provides in part that:

> . . . any action that violates the military service act or the regulations, or the *related processes* cannot be in the national interest.
>
> It follows that those who violate them [including the related processes] should be denied deferment in the national interest. It also follows that *illegal activity* which interferes with recruiting or causes refusal of duty in the military or naval forces could not by any stretch of the imagination be construed as being in support of the national interest . . .
>
> It is to be hoped that misguided registrants will recognize the long-range significance of accepting their obligations now, rather than hereafter regretting their actions performed under unfortunate influences of misdirected emotions . . . (emphasis added).

travenes not only the general rule against vague statutes, *Baggett v. Bullitt*, 377 U.S. 360 (1964), but also the rule in *Dombrowski v. Pfister*, 380 U.S. 479 (1965), which condemns statutes that are so broad in their sweep as to impose an intolerable restraint or have a "chilling" effect on the exercise of free speech. If Selective Service registrants can be punished by the delinquency procedures, as petitioner was, for writing a protest letter to a Local Board, then still another means of protest has been effectively chilled. Yet this Court has recently held that debate on public issues, particularly issues as important as the peacetime draft and the Vietnam war, should be "uninhibited, robust and wide-open." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

At present the means by which young men such as petitioner can register their protest are narrowly limited. Few registrants, most of whom are students, control news media or can afford to advertise. Congress has not responded to letters or peaceful picketing. Draft card burning is punishable as a felony, as is intentional surrender of a draft card. 50 U.S.C. App. §462(b), as amended, 79 Stat. 586. Petitioner in the instant case has chosen an entirely peaceful means of expressing his protest, and if he can be punished by the delinquency procedures for that expression, then those procedures are impermissibly vague and overbroad.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

KENNETH A. MACDONALD
DAVID R. HOOD
Attorneys for Petitioner

CERTIFICATE OF COUNSEL

We certify that the within and foregoing Petition for Rehearing is presented in good faith and not for delay, and that it is restricted to substantial grounds available to petitioner although not previously presented.

KENNETH A. MACDONALD
DAVID R. HOOD
Attorneys for Petitioner